

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-04-0359 WBS KJM

vs.

FRANK ANGEL ORIHUELA,

Movant.

FINDINGS AND RECOMMENDATIONS

Movant is a federal prisoner proceeding with an application for writ of habeas corpus under 28 U.S.C. § 2255. Movant stands convicted of being a deported alien found in the United States and is serving a sentence of 60 months imprisonment in the Federal Bureau of Prisons. Movant pled guilty pursuant to a negotiated agreement.

The underlying basis of movant's petition is his position that his sentence is unlawful because it was never found beyond a reasonable doubt, or charged in an indictment, that movant had committed a particular prior aggravated felony used to extend movant's sentence. Pet. at 5, 7.¹ Movant fails to point to anything suggesting this renders his sentence unlawful. Moreover, movant specifically admitted he committed the prior aggravated felony in question as

¹ Page numbers referenced are those assigned by the court's CM/ECF system.

1 part of his plea agreement. See Answer, Ex. 1 at 2:17-22. Nothing suggests movant's sentence
2 violates any aspect of federal law. Almendarez-Torres v. United States, 523 U.S. 224, 239, 244
3 (1998); Apprendi v. New Jersey, 530 U.S. 466, 488-89 (2000); United States v. Pacheco-Zepeda,
4 234 F.3d 411, 414-15 (9th Cir. 2000).

5 Movant also makes much of the fact that his counsel failed to file a notice of
6 appeal on his behalf, challenging the use of the prior felony in sentencing. However, movant
7 waived his right to appeal in his plea agreement. Answer, Ex. 1 at 3:11-19. Nothing before the
8 court suggests that waiver was uninformed or involuntary.

9 Accordingly, the court will recommend that movant's § 2255 habeas application
10 be denied.

11 In accordance with the above, IT IS HEREBY RECOMMENDED that:

12 1. Movant's December 12, 2005 application for writ of habeas corpus under 28
13 U.S.C. § 2255 (#20) be denied; and

14 2. The clerk of the court be directed to close the companion civil case No. CIV-S-
15 05-2506 WBS KJM P.

16 These findings and recommendations are submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
18 days after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
21 shall be served and filed within ten days after service of the objections. The parties are advised
22 that failure to file objections within the specified time waives the right to appeal the District
23 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 DATED: February 26, 2009.

25 1

26 orih0359.257


U.S. MAGISTRATE JUDGE